

**JENNER & BLOCK**

May 24, 2004

Defense Acquisition Regulations Council  
Attn: Ms. Amy Williams  
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**Re: DFARS Case 2003-D087**

Dear Ms. Williams,

Jenner & Block is pleased to submit the following comments to Draft DFARS Clause 252.225-70XX, Case 2003-D087, dated March 23, 2004.

**GENERAL COMMENT:**

Draft DFARS Clause 252.225-70XX addresses novel aspects of the government/contractor relationship in unusual circumstances. In our view, the draft clause attempts to cover too many disparate situations in a single provision. As written, the clause covers a wide spectrum of situations without distinguishing among the nature of future operations or even expected geopolitical conditions. Contingency, humanitarian, peacekeeping, and combat operations are potentially greatly dissimilar. Jenner & Block believes that any regulatory coverage should be tailored and specialized to address these varied scenarios. Supporting the U.S. military in a peacetime operation in a friendly country requires personnel, planning, and equipment that would be inappropriate, at best, for supporting the military in a wartime operation. Creation of a more tailored approach would allow the Department of Defense and industry to treat different situations differently without risk of impasse or confusion.

**SPECIFIC COMMENTS:**

**Comment: DFARS 252.225-70XX(a) Definitions.** The Combatant Commander (CC) or "any subordinate commander given authority" can issue directions to contractors under the clause. This definition demonstrates the extent of the departure from standard contracting procedures contemplated by this clause. The Government should specify how subordinate commanders are to be designated and identified to the contractor. The Government should also make clear the types of direction a CC may issue. For example, the CC should have the ability to issue direction pertaining to the physical support the Government provides to the contractor in the deployed environment, and/or to issues pertaining to force protection and security, but not direction to change the administrative requirements of a contract such as payment or cost-reimbursable provisions, tour length, and personnel qualifications. The CC's direction to contractors should be provided in writing and routed through the PCO for assessment of potential contract implications. While oral directions from the CC should be permitted when circumstances dictate, they should be followed by written ratification.

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**Comment: DFARS 252.225-70XX(b)(2) General.** Many contractor support functions to deployed forces are not "inherently dangerous." Deployed tasks carry increased risks over normal foreign travel and require contractors to endure austere conditions. As a result, many companies compensate deployed personnel in accordance with the expected conditions. If all contractor support services were inherently dangerous, most companies would reconsider sending employees to provide such services, and compensation to deployed employees would have to be adjusted accordingly. We recommend a change of language to "Contract performance in support of such forces may lead to increased danger and require work in austere conditions."

**Comment: DFARS 252.225-70XX(c). Government Support of Contractor Personnel.** In many cases, companies do not, and can not, provide in-country support for deployed employees. Where local conditions permit routine and safe international business travel, proposal costs relating to transportation costs, lodging, meals, taxes, etc. may be estimated for overseas services performed at a specific location. When supporting deployed forces, however, industry has neither the ability to price nor to provide in-country support to contractor personnel. As a general rule, contractor personnel have received, and should receive support commensurate with the uniformed service members with whom they serve. The required/authorized Government-provided in-country support referenced in this clause should be stated in the RFP/contract.

**Comment: DFARS 252.225-70XX(d) Knowledge of and Compliance with Local Laws.** This requirement would not be possible to comply with under a number of circumstances. In some cases, U.S. laws and local laws conflict. For example, while US laws prohibit compliance with the Israeli Boycott, local laws may require it. US military operations themselves may not comply with local laws. Additionally, when individual employees are assigned to classified locations, private business has no ability to verify compliance with local law. Contractors frequently do not know the terms of international agreements and local military regulations. Status of Forces Agreements, for example, are often classified and not reasonably available to a contractor. Likewise, Contractors have little access to local regulations and directives. We recommend that the Government qualify this obligation to cover the extent to which the contractor has been advised of local laws.

**Comment: DFARS 252.225-70XX(e)(2) Contractor Personnel.** We recommend that the Government provide a data item description for the desired unavailable employee replacement plan and list the plan on the contract data requirements list.

**Comment: DFARS 252.225-70XX(g) Pre-Deployment Preparation.** This clause should be revised to refer to a specific number of employees a contractor can provide to meet the desired qualifications. This would permit advance negotiations between contractors and customers and avoid lag times once operations begin. In addition, (g)(3), (4), and (5) should also be qualified to specific types of peacetime employees. Contractor support for military operations should not be limited by these requirements.

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**Comment: DFARS 252.225-70XX(h) Military Clothing and Protective Equipment.**

We recommend that the Government revise this clause to inform the Contractor of necessary clothing and protective equipment. Additionally, the Government should be responsible for making necessary protective equipment available to the contractor that is not otherwise accessible to private citizens.

**Comment: DFARS 252.225-70XX(i) Weapons.** Industry in general normally does not issue weapons, train employees in weapon use, or permit employees to carry weapons. While this requirement may be appropriate for some types of contractors and theaters, it is not appropriate for most. If employees carry and/or use private firearms, they subject themselves and the contractor to a number of legal issues. Additionally, if the military authorizes a contractor employee to carry a privately owned firearm, the contractor has no way to ensure the employee is adequately trained. In those circumstances when contractors employees are to carry weapons, the firearms should be provided by the Government.

**Comment: DFARS 252.225-70XX(k) Evacuation of Bodies.** Industry would expect the United States to repatriate employees injured or killed in the line of duty to the United States as part of the logistics support provided to these employees.

**Comment: DFARS 252.225-70XX(l) Evacuation.** Contractor employees often provide services relatively far forward during military operations along with U.S. Forces. The retention or evacuation of personnel performing these services is the Government's determination. If the Government decides to evacuate contractor personnel, the Government should furnish transportation to do so. Separate from support for military operations, the United States should continue to follow existing practices of evacuating contractor personnel and their dependents when conditions cause the United States to issue travel warnings or permit voluntary evacuation of non-essential U.S. Government personnel and dependants.

**Comment: DFARS 252.225-70XX(m) Insurance.** Additional insurance coverage for war hazards, normally excluded from group life insurance policies, should be an allowable cost. We recommend that the Government establish a mechanism for facilitating that coverage on an industry-wide basis in order to allow contractors to pool purchasing power. Individual contractors provide relatively few field employees for deployment. If the Government facilitated a larger risk pool, the Government would benefit from lower Contractor insurance costs.

**Comment: DFARS 252.225-70XX(p) Changes.** The Government should also make clear the types of direction that a CC may issue. If a subordinate commander will be providing directions or instructions, the Government should specify how such subordinate commanders are to be designated and identified to the contractor. In addition, under (p)(3) the clause should read: "The Contractor may submit a request for equitable adjustment for any additional effort required, cost incurred, or any loss of contractor-owned equipment occasioned by such direction."

**Comment: DFARS 252.225-70XX(q)(1) Changes in Emergencies.** The last sentence should read; "... the ranking military commander in the immediate area of operations may direct the Contractor or contractor employee to undertake any action to avoid death or serious injury to

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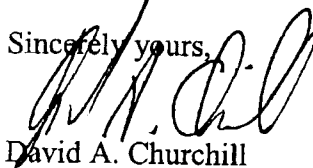
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contractor or to military personnel, as long as those actions do not require the contractor employee to engage in armed conflict of any kind, or to enter areas of armed conflict."

**Comment: DFARS 252.225-70XX(q)(2) Changes in Emergencies.** The clause should read: "The Contractor may submit a request for equitable adjustment for any additional effort required, cost incurred, or any loss of contractor-owned equipment occasioned by such direction."

We appreciate the opportunity to submit comments on this proposed rule.

Sincerely yours,



David A. Churchill

DAC:tms

## FAX TRANSMITTAL

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